24.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

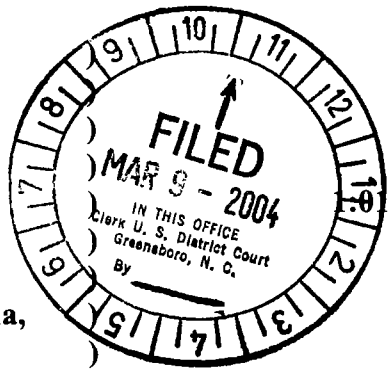
SAMUEL RUSSELL FLIPPEN,

Petitioner,

v.

R.C. LEE, Warden,
Central Prison, Raleigh, North Carolina,

Respondent.



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RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Samuel Russell Flippen, a North Carolina death row inmate, filed this habeas corpus proceeding pursuant to 28 U.S.C. § 2254, challenging his 1995 state court conviction for first-degree murder and 1997 sentence of death. The jury in Petitioner's second sentencing hearing, after his first death sentence was vacated on appeal and his case remanded for re-sentencing, again recommended a sentence of death, and the judge imposed that sentence on May 23, 1997. Petitioner seeks in this action a writ of habeas corpus discharging him from his confinement and restraint, setting aside his conviction, and relieving him of his sentence of death. Petitioner Flippen is represented by attorneys Richard M. Greene and Brian K. Tomlin. Respondent R. C. Lee (the "State"), warden of Central Prison, is represented by the North Carolina Attorney General, with Special Deputy Valerie B. Spalding appearing.

THE STATE COURT PROCEEDINGS

Petitioner Flippen was convicted of first-degree murder at the March 6, 1995 Criminal Session of the Superior Court of Forsyth County, North Carolina and was sentenced to death on

March 7, 1995. His conviction was affirmed by the Supreme Court of North Carolina on November 8, 1996, but the court found error in his sentencing hearing because the trial judge failed to instruct the jury that it must give mitigating value to a statutory mitigating circumstance stipulated to by the State and Petitioner. The case was remanded for a new capital sentencing hearing. *See State v. Flippen,* 344 N.C. 689 (1996)("*Flippen I*"). Petitioner was sentenced to death at his second sentencing hearing. His sentence was affirmed by the Supreme Court of North Carolina on November 6, 1998. *See State v. Flippen*, 349 N.C. 264 (1998)("*Flippen II*"). On May 24, 1999, the United States Supreme Court denied certiorari review. *See Flippen v. North Carolina*, 526 U.S. 1135 (1999).

On February 14, 2000, Petitioner filed a Motion for Appropriate Relief ("MAR") in the Superior Court of Forsyth County. The State responded in opposition. On December 21, 2000, Judge William Z. Wood, Jr. entered an Order denying (1) the claims presented in the MAR, (2) Petitioner's motion for discovery, (3) Petitioner's motion for funds to hire a private investigator, and (4) Petitioner's motion for funds to hire a mitigation assistant. *See* Respondent's Answer, Ex. T, Memorandum Opinion and Final Order, Dec. 21, 2000 ("MAR Order"). Petitioner filed a petition for Writ of Certiorari with the Supreme Court of North Carolina, but that court denied certiorari review.

On July 11, 2001, Petitioner filed his Petition for Writ of Habeas Corpus with this Court. Respondent timely filed an Answer. The parties have briefed their positions, and the Petition is now ready for a ruling. *See* Rule 8(a), Rules Governing § 2254 Cases.

THE CLAIMS OF THE HABEAS CORPUS PETITION

Petitioner Flippen presents the following claims in his habeas petition.

I. Petitioner was denied effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights during trial and on appeal.

A. Ineffective assistance of counsel at guilt phase.

1. Petitioner received ineffective assistance from defense counsel in that defense counsel conceded Petitioner's guilt during closing arguments without Petitioner's consent.

2. Petitioner received ineffective assistance from defense counsel in that defense counsel failed to use medical experts to assist: i) in reviewing and evaluating the autopsy report; ii) in preparing for cross-examination of State's medical witness; and iii) in evaluating the State's case for purposes of assisting petitioner to make informed decisions concerning acceptance of any pleas offered by the State.

3. Petitioner received ineffective assistance from defense counsel in that defense counsel failed to properly advise Petitioner on plea offer from State of second-degree murder.

4. Petitioner received ineffective assistance from defense counsel in that defense counsel failed to object to prosecutor's "death qualifying" of prospective jurors through use of peremptory challenges, failed to attempt to rehabilitate scrupled jurors excused for cause for their death penalty views.

5. Petitioner received ineffective assistance from defense counsel in that defense counsel failed to object to prosecutor's improper jury argument.

B. Ineffective assistance of counsel at resentencing phase.

1. Petitioner received ineffective assistance from defense counsel in that defense counsel failed to use medical experts to assist: i) in reviewing and evaluating the autopsy report; ii) in preparing for cross-examination of State's medical witness; iii) in presenting evidence for Petitioner; and iv) in challenging the sufficiency of the evidence to support an "especially heinous, atrocious or cruel" aggravating factor.

2. Petitioner received ineffective assistance from defense counsel in that defense counsel failed to object to prosecutor's "death qualifying" of prospective jurors through use of peremptory challenges and failed to

attempt to rehabilitate scrupled jurors excused for cause for their death penalty views.

3. Petitioner received ineffective assistance from defense counsel when defense counsel conceded Petitioner's guilt during closing arguments without Petitioner's consent.

4. Petitioner received ineffective assistance from defense counsel when defense counsel failed to object to State's improper argument.

5. Petitioner received ineffective assistance from defense counsel when defense counsel failed to adequately prepare for the sentencing hearing.

C. Ineffective assistance of appellate counsel.

II. The trial court deprived Petitioner of his due process rights to be present at every stage of his capital proceedings by failing to make a true, accurate and complete record of all proceedings and failing to ensure Petitioner was present at all critical stages of his trial.

III. The North Carolina two-step mitigation instruction violated Petitioner's Eighth and Fourteenth Amendment rights.

IV. The North Carolina Supreme Court's method of proportionality review violated Petitioner's due process rights.

A. The North Carolina Supreme Court violated Petitioner's federal constitutional rights in making its proportionality decision in that it has created a new statutory aggravating circumstance by affirming the submission and finding of the especially heinous, atrocious, and cruel aggravating circumstance in virtually all cases in which the homicide victim is a child.

B. The North Carolina Supreme Court violated Petitioner's federal constitutional rights in making its proportionality decision in that it affirmed the submission and finding of the especially heinous, atrocious, and cruel aggravating circumstance despite evidence indicating that, aside from the fact that the case at bar involved the homicide of a child, the case is not similar to those in the most accurate proportionality pool.

V. The *Flippen II* trial court committed prejudicial error and violated the double jeopardy clause by failing to give a mandatory peremptory instruction on the statutory mitigating circumstance that Petitioner had no significant history of prior criminal

activity when the State had stipulated in *Flippen I* that Petitioner had no significant history of prior criminal activity.

The State contends in its Answer and accompanying Motion to Procedurally Default Flippen's Habeas Claims that Petitioner's claims I.A.4, I.A.5, and II were procedurally defaulted before the state courts. The MAR court held these three claims to be procedurally defaulted pursuant to N.C. Gen. Stat. § 15A-1419(a)(3) because Petitioner could have raised these claims on direct appeal to the North Carolina Supreme Court but did not do so. The State also contends that claims I.B.2, I.B.3, I.B.5, and I.C. are unexhausted, but the State waives the exhaustion requirement.

THE EVIDENCE PRESENTED AT TRIAL

The Supreme Court of North Carolina summarized the evidence presented at Petitioner's trial in 1995 as follows:

> The State presented evidence at trial tending to show that on 12 February 1994 defendant fatally beat his two-year-old stepdaughter, Brittany Hutton. At approximately 9:15 that morning, Tina Flippen, Brittany's mother and defendant's wife, left for work, leaving Brittany alone with defendant. At 10:11 a.m., defendant called 911 to report that Brittany had fallen and was having difficulty breathing. Five emergency medical personnel from both the Clemmons Rescue Squad and the Forsyth County EMS responded to defendant's trailer. Several members of the rescue teams testified that when they arrived at the scene, Brittany was pale, her lips were ash gray, her pupils were fixed and dilated, and she was making gasping-type respirations. Despite rescue efforts, Brittany was pronounced dead at the North Carolina Baptist Hospital in Winston-Salem at 10:51 a.m.
>
> Dr. Donald Jason, a forensic pathologist who performed an autopsy on the victim, testified that he observed injuries to Brittany's head, neck, chest, abdomen, back, and extremities. Dr. Jason testified that Brittany died as a result of internal bleeding due to severe tearing of her liver and pancreas. He opined that these injuries could not have been caused by an accident such as a single fall, but rather that the injuries were consistent with one or more very powerful punches or blows to Brittany's abdomen.
>
> Defendant testified that on the morning of Brittany's death, he placed her in a high chair and then went into another room where he could not see her. While

there, defendant heard a loud noise, at which time he returned to find that the child had fallen and was having difficulty breathing. Thereafter, defendant called 911 for emergency assistance.

Flippen, 344 N.C. at 693-94.

Petitioner was represented at trial by retained counsel, Fred G. Crumpler, Jr. and David B. Freedman. The State was represented by Eric Saunders and Ina Weinman.

THE HABEAS CORPUS STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d)(1), a federal court may issue a writ of habeas corpus only if a state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor,* 529 U.S. 362 (2000) interprets § 2254(d)(1):

> [T]he writ may issue only if one of the following two conditions is satisfied-- the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412-13 (O'Connor, J., delivering the opinion in part, concurring in part.)

Further:

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411.

I.

Ineffective Assistance of Counsel Claims at Guilt Phase

CLAIM I.A.1

Petitioner contends that he received ineffective assistance of counsel at the guilt phase of his trial when counsel conceded Petitioner's guilt during closing argument without consulting with or receiving the permission of Petitioner. Petitioner contends that counsel's unauthorized strategy in argument was to concede guilt on second-degree murder while contesting guilt on first-degree murder despite the fact that Petitioner had testified at trial that he did not kill Brittany Hutton or abuse her in any way.

"It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The accused has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). While this requirement does not mean that a defendant is guaranteed an error free trial or perfect performance by counsel, if the adversarial nature of the trial is eliminated by counsel's inadequate performance, then the right has been violated. *See id.* at 656-57. A claim that counsel's assistance was so defective as to merit reversal of a conviction has two components.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial.

Strickland, 466 U.S. at 687. To establish ineffectiveness, a "[Petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Supreme Court of North Carolina has decided that "ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180 (1985). Thus, under state law, it is not necessary to show the second prong of the *Strickland* test, that the defendant was prejudiced by counsel's performance in improperly conceding guilt.

Nonetheless, federal courts do not recognize the *per se* rule of *Harbison*, and it remains necessary in a federal habeas action for the petitioner to show prejudice in addition to deficient performance. *See Clozza v. Murray*, 913 F.2d 1092, 1097 (4th Cir. 1990). If counsel concedes his client's guilt without the permission of the client, counsel's performance will be deemed deficient if the concession is irrational. *See Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983). However, a "tactical retreat" is different from a "complete surrender." *Clozza*, 913 F.2d at 1099. Thus, certain tactical concessions may be acceptable and even advisable trial strategy under appropriate circumstances.

On review, this Court finds Petitioner's Claim I.A.1 to be without merit. Petitioner's claim fails simply because a fair reading of the transcript shows that Petitioner's counsel did not, in fact, concede Petitioner's guilt to either first or second-degree murder during closing argument to the jury.

Defense counsel first argued that Petitioner was not responsible for Brittany Hutton's death, and this was fully consistent with Petitioner's testimony. Petitioner now contends that counsel conceded Petitioner's guilt to second-degree murder by arguing, *in the alternative*, that Petitioner was at least not guilty of first-degree murder, thereby suggesting to the jury that it could find Petitioner guilty of second-degree murder if it did not find Petitioner's testimony credible. Petitioner contends that counsel's apparent strategy was to concede guilt on second-degree murder in order to avoid a conviction on first-degree murder. Petitioner contends that counsel argued that Petitioner acted in an outburst of anger and hit Brittany with one solid blow, but that Petitioner did not intend to kill Brittany. The trial transcript shows that this is a mischaracterization of counsel's over-all argument.

After making an initial statement that this was a sad case, involving the death of a two-year-old girl, Petitioner's trial counsel, Mr. Freedman, asserted that "what they [the State] have not shown to you beyond a reasonable doubt is that Sammy Flippen is responsible for the death of that little girl." (Respondent's Answer, Ex. A5, Transcript of the Evidence ("Trial tr.") at 1132.) Counsel argued that there was no evidence that Petitioner had a wicked temper (*id.* at 1133) and no evidence that Petitioner abused Brittany prior to the day she died. (*Id.* at 1134.) Counsel argued that numerous witnesses testified that Petitioner loved Brittany and had a good relationship with her. (*Id.* at 1135-36.) Counsel argued that Petitioner did not necessarily have exclusive control of the child at the time she was hurt. (*Id.* at 1136.) Counsel argued that Petitioner called 911. (*Id.* at 1136-37.)

Counsel argued that it was likely that many of Brittany's bruises occurred after rescue personnel arrived and that some may have existed before Brittany's fatal injury. (*Id.* at 1137-39.)

Only after making these and other arguments that Petitioner should be found not guilty of murder at all did Petitioner address the specific issues of first and second-degree murder. Counsel began this discussion by saying, "Keep in mind . . . - - if you should find - - and, again, I contend to you the evidence is not there, but if you should find Mr. Flippen is guilty and responsible for the death of Brittany Hutton, only then would you then decide whether he's guilty of first-degree murder or second-degree murder." (*Id.* at 1140.) Counsel then argued that the elements of first-degree murder were not present. Counsel did argue that Brittany's injuries are more consistent with second-degree murder than first-degree murder, but counsel did not concede murder. Instead, counsel encouraged the jury to find second-degree murder only if the jury "believe[d] their [the State's] theory," that Petitioner was responsible for Brittany's death. (*Id.* at 1144.) Finally, in stressing Petitioner's innocence to all charges, Mr. Freedman concluded his argument by saying, "I believe when you analyze the evidence that certainly you would find Mr. Flippen not guilty of anything more than second-degree murder and I also contend to you the State has failed in their burden in this case and you must find Mr. Flippen not guilty." (*Id.* at 1147.)

Petitioner's co-counsel, Mr. Crumpler, made a further closing argument for Petitioner. He did not even address the question of second-degree murder until the final two sentences of his argument. He concluded:

> First, as to first-degree murder, I have not discussed that but just briefly because I don't think, in my opinion, the evidence does not support that verdict under any circumstance. Second-degree murder, if you follow the rules that you consider only the evidence presented to you and apply the law His Honor charges you that there is

> one verdict in this case and that verdict is not guilty and I ask that each of you render that verdict.

(*Id.* at 1172.) Mr. Crumpler's closing argument primarily addressed the insufficiency of the State's evidence, the possibility that some of Brittany's bruises were inflicted after her fatal incident by rescue personnel, and the evidence that Petitioner was a good stepfather.

Careful review of the record as explicated above shows that Petitioner's counsel never conceded Petitioner's guilt to second-degree murder. Counsel's argument regarding second-degree murder was in the alternative - that the jury, if it could not return a not-guilty verdict, should at most find Petitioner guilty of second-degree murder instead of first-degree murder. This approach was clearly a matter of trial strategy, and issues of strategy are accorded great deference. Counsel is allowed "wide latitude" in "making tactical decisions." *Strickland*, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable." *Id.* at 690. Here, counsel made a strategic choice to make an alternative argument for second-degree murder after first arguing for a not-guilty verdict. That strategy will not be disapproved by this Court and, indeed, appears to have been a sound strategy that sought to avoid exposing Petitioner to the death penalty. In all, counsel's performance in closing argument was reasonable and cannot support a habeas claim under the Sixth Amendment.

CLAIM I.A.2

Petitioner contends that he received ineffective assistance from defense counsel in the guilt/innocence phase of trial because counsel did not obtain the assistance of a medical expert to review the autopsy report, to prepare for cross-examination of the State's medical witness, or to

evaluate the State's case in order to assist Petitioner in deciding whether to accept a plea offer made by the State.

Petitioner contends that if counsel had obtained the assistance of a medical expert, even if the expert agreed completely with the State's expert about the cause of Brittany's death, Petitioner's counsel would have been better able to evaluate the State's case, to advise Petitioner that the State would be able to prove their case of first-degree murder, to explain to Petitioner that the testimony he intended to give would not be credible to the jury, and to advise Petitioner that he should accept the State's plea offer for second-degree murder. Petitioner contends that without the assistance of a medical expert, he was unable to make an informed decision about whether to accept the plea offer.

Petitioner does not contend that a defense medical expert would have provided an opinion contrary to the State's theory of the case. Moreover, Petitioner does not specifically describe how the assistance of a medical expert who would give substantially the same opinion as the State's expert would have helped either in preparation for trial or at trial. Petitioner also does not allege that he would have accepted the State's plea offer if he had received the assistance of a medical expert. The state MAR court found that counsel was not ineffective in not retaining a medical expert to provide assistance either before or at trial. (MAR Order at 26-28.)

In their affidavits, Mr. Crumpler and Mr. Freedman attest that they thoroughly discussed the plea offer to second-degree murder made by the State and advised Petitioner to take it. Mr. Crumpler stated:

> Mr Freedman and I spent a great deal of time prior to the first trial discussing with Mr. Flippen the plea offer made by the prosecution to one count of second degree murder. Mr. Flippen scoffed at the offer and would not take it seriously.

> We advised Mr. Flippen that if he insisted on going to trial, our best hope was to persuade the jury that he was guilty of second degree murder. We advised Mr. Flippen that the defense would have to offer an explanation to the jury either through Mr. Flippen or through other witnesses as to how Brittany's death had occurred. We advised Mr. Flippen that the jury would probably not believe him if he took the witness stand, and we asked him not to do so. We never urged him to testify on his own behalf at the guilt/innocence phase; and his unproductive and unfortunate attitude towards the prosecutor, as well as his accusations that all the emergency personnel and others who had attended his stepdaughter were lying at trial bore out our fears that he would seriously damage his own case.

(Respondent's Answer, Ex. Q, Tab 1, Crumpler Aff. at 3-4.) Mr. Freedman made a nearly identical statement in his affidavit. (Respondent's Answer, Ex. Q, Tab 2, Freedman Aff. at 3-4.)

Attorneys Crumpler and Freedman are thoroughly experienced in the practice of criminal defense. Lead counsel Crumpler had tried well over a dozen capital cases and practiced criminal law for forty-two years. (Crumpler Aff. at 1.) Attorney Freedman had practiced criminal law for eighteen years. (Freedman Aff. at 1.) Counsel were able to meaningfully review the straight-forward autopsy report, and no showing has been made to the contrary. Absent a specific showing of incompetence, there is no reason counsel could not understand the results of the autopsy and understand the consequences of the results to Petitioner's case. The attorneys' affidavits show that they fully understood the seriousness of the State's medical evidence and advised Petitioner to accept the State's plea offer. The affidavits also show that Petitioner refused to take this advice seriously. There is no indication that Petitioner would have given more credence to the advice of a physician, and, in any event, Petitioner has not even to this late date presented any medical challenge to the State's evidence regarding the cause of the victim's death.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not

to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. In this case, counsel made a decision that there was no need to retain the services of a medical expert to interpret the autopsy results. Counsel decided that they were able to adequately advise the Petitioner on the State's plea offer and to prepare to question the State's medical expert. Absent a specific showing of how a medical expert could have convinced Petitioner to accept the plea offer or could have rebutted the State's medical evidence, Petitioner fails to make out either the performance or the prejudice part of the *Strickland* test for ineffective assistance of counsel.

CLAIM I.A.3

In this claim, Petitioner contends that he received ineffective assistance from defense counsel in that counsel failed to properly advise Petitioner of a plea offer from the State of second-degree murder. The record shows that the requirements of this plea offer were (1) that Petitioner state his guilt and (2) that he explain in the presence of the victim's mother why he beat the child to death. (MAR Order at 31.)

As previously discussed, the affidavits of attorneys Crumpler and Freedman show without contradiction that counsel discussed the plea offer with Petitioner, advised him to take the plea offer, and discussed with him the likely outcome of trial should he exercise his right to go to trial. Counsel advised Petitioner that the best he could hope for at trial was a conviction for second-degree murder. In their affidavits, counsel attest that Petitioner scoffed at the idea of taking the plea offer and refused to even consider it.

Petitioner's primary argument under this claim appears to be that since counsel failed to consult a medical expert, counsel were not in a position to provide Petitioner with informed advice

regarding the second-degree murder plea offered by the State. He also contends that he was given insufficient notice by the State that it intended to try him for capital murder.

The Court will not in this section fully explicate the claim that defense counsel was not in a position to provide informed advice about the plea offer because they failed to consult a medical expert. This argument was fully explored in Claim I.A.2 above and is without merit.

Turning to Petitioner's second argument, the Court notes that the record is not completely clear at what point Petitioner became aware that he would be tried for capital murder, but it is clear that Petitioner was aware of this fact prior to proceeding to trial. Knowledge of this would have been necessary for Petitioner to make an informed decision to accept or reject the State's plea offer. The magistrate's order of March 4, 1994, which found probable cause for Petitioner's arrest and detention, was based on the charge that he did with "malice aforethought kill and murder Brittany Nicole Hutton." (Respondent's Answer, Ex. B at 2.) This indicates that the State intended to pursue a conviction on first-degree murder. On October 31, 1994, the Grand Jury brought a murder indictment and did not limit the indictment to second-degree murder, thereby allowing the State to pursue a conviction on first or second-degree murder. (*Id.* at 3.) The record shows that the State indicated that it intended to proceed with the case as a capital case during a pretrial conference held on December 1, 1994. (*Id.* at 4, 6). Petitioner contends that this notice was insufficient because Petitioner was not present at this conference. On December 14, 1994, Petitioner filed a Motion to Strike Death Penalty and a Motion for Disclosure of Aggravating and Mitigating Circumstances. (*Id.* at 7-14.) Petitioner argues that since ten months passed between his arrest and when the State formally disclosed its intention to proceed capitally, counsel should have more fully documented that

they discussed with Petitioner the different degrees of murder he could be prosecuted for and the potential penalties that attached to the different degrees.

There is documentation that Petitioner had sufficient notice that he would be tried capitally. As discussed above, the record shows that Petitioner was aware he would be tried capitally by December 1, 1994, at the latest. This is nearly a full three months before the start of trial. There is simply no evidence that counsel did not share this information with Petitioner although he was not present at the pretrial conference. Counsel had numerous motions to prepare relating to the capital aspect of the trial, and there is no evidence Petitioner was unaware of these motions. Attorneys Crumpler asserts in his affidavit that "early in the case the aggravating factor of especially heinous, atrocious or cruel arose openly in court and was discussed" and that Petitioner was present to hear this discussion. In addition, counsel discussed the capital aggravator with Petitioner. (Crumpler Aff. at 4.)

Petitioner relies on *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001), for the proposition that he was prejudiced by counsel's performance in advising him about the plea offer and that there is a reasonable probability he would have taken the plea offer had he been better advised. In *Magana*, the defendant was charged with three drug counts. One count was for possession of cocaine with intent to distribute, one count was for conspiracy to possess cocaine with intent to distribute, and the third count was a marijuana charge. The two cocaine counts carried sentences of ten to twenty years which were to run consecutively. The prosecutor offered to drop one of the cocaine charges in exchange for a guilty plea and a ten-year sentence. However, the defendant's counsel advised him, incorrectly, that if he were convicted of both cocaine charges, the sentences would run concurrently, so the defendant would receive a ten-year sentence whether he accepted the

plea offer or was convicted. Accordingly, the defendant followed the advice of counsel and rejected the plea offer. The defendant was convicted on both cocaine counts and was sentenced to two ten-year sentences that were to run consecutively.

The Sixth Circuit in *Magana* presumed deficient performance under the two part *Strickland* test since the State only addressed the question of prejudice. In order to show prejudice, the defendant had to show that but for his counsel's advice, there was a reasonable probability that he would have pleaded guilty. *See id* at 547. *See also Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *United States v. Day*, 969 F.2d 39, 45 n.8 (3rd Cir. 1992). The court found that there was a reasonable probability the defendant would have taken the plea offer if his counsel had given him accurate advice. His counsel testified that he advised the defendant to go to trial and that he would receive a ten-year sentence whether he was found guilty on all counts or accepted the plea offer. The defendant testified that he would have accepted the plea offer had he known that he faced the possibility of a forty-year sentence at trial and a minimum sentence of twenty years if he was convicted on both cocaine charges. *Magana*, 263 F.3d at 551-52. The court concluded that there was a reasonable probability the defendant would have accepted the plea offer had he been given competent advice of counsel.

Petitioner Flippen's case has little or nothing in common with *Magana*. Here, Petitioner's counsel adequately advised him of the consequences of rejecting the State's plea offer. Attorneys Crumpler and Freedman attest that they spent a "great deal of time" discussing the plea offer with Petitioner and he "scoffed at the offer and would not take it seriously." (Crumpler Aff. at 3; Freedman Aff. at 3.) Counsel asserts that they advised Petitioner that the best result he could hope for from a trial was a conviction on second-degree murder and they discussed with Petitioner the

consequences of being convicted of first-degree murder including the penalty phase of the trial and the death qualification of jurors. (Crumpler Aff. at 3-4; Freedman Aff. at 3-4.). The MAR court found that counsel had fully informed Petitioner of the implications attached to his capital trial. (MAR Order at 31.)

Petitioner has not raised a colorable claim that there is a reasonable probability he would have accepted the State's plea offer under any circumstances. Unlike the facts in *Magana*, there is no evidence that counsel advised Petitioner that he had nothing to lose by going to trial. The advice of counsel allowed Petitioner Flippen to make an informed decision about whether he should accept the plea offer or proceed to trial. The MAR court noted that Petitioner never even alleged that he would have accepted the State's plea offer had he been advised differently. (MAR Order at 31.) Accordingly, the state court's conclusion that Petitioner's trial counsel provided effective assistance in advising him concerning the State's plea offer was neither contrary to nor an unreasonable application of Federal law.

CLAIM I.A.4

Petitioner contends that he received ineffective assistance of counsel when counsel failed to attempt to rehabilitate jurors who were excused for cause after they, during *voir dire*, expressed their opposition to capital punishment and stated that they could not sentence Petitioner to death. Petitioner also contends that he received ineffective assistance from counsel when counsel failed to object to the State's "death qualifying" of the jury through the use of peremptory challenges to remove jurors who expressed concerns about and opposition to the death penalty but stated that they were able to put their personal concerns aside and follow the law and deliver a death sentence if the law required.

Four prospective jurors were removed for cause because of their refusal to apply the death penalty under any circumstances. (Respondent's Answer, Ex. A2, Transcript of Jury Selection, Vols. 1, 2 at 90-93, 106-08, 109-10, 487-90.) Petitioner contends that his counsel did not attempt to rehabilitate three of these individuals. Petitioner concedes that counsel attempted to rehabilitate the fourth, but the trial judge did not allow further questioning.

The first prospective juror who was removed for cause because of her views on the death penalty expressed some hesitancy when first questioned by the State. (*Id.* at 90-93.) At first she stated that she would probably automatically vote for life imprisonment rather than a death sentence regardless of the evidence. She then stated that she would be especially hesitant to vote for death in a case that relied on circumstantial evidence. When pressed as to whether she would be unwilling to vote for death under any circumstance, she stated, "I think so, yes." (*Id.* at 92.) The State challenged her for cause, at which point the trial judge questioned her directly. The prospective juror was once again noncommital, stating that if the evidence were strong enough she might be able to vote for the death penalty, but that she understood that there were no witnesses to the fatal act in this case. The Court pressed her for a more direct answer:

> The Court: The only - - the only inquiry we can make at this point, ma'am, is your personal beliefs with regard to the death penalty in general because you have no knowledge of the evidence in this case. Do you understand that?
>
> Prospective Juror One: Right.
>
> The Court: So we need to inquire as to your personal or moral or religious beliefs about the death penalty.
>
> Prospective Juror One: I don't believe I could impose the death penalty.
>
> The Court: Do you believe that there are no circumstances under which you as a juror could even consider voting in favor of a sentence of death?

> Prospective Juror One: I would just find it hard to live with if I voted for the death penalty. I don't think I could.
>
> The Court: Let me ask you this, ma'am: Do you believe that because of your opinions about the death penalty you have already made up your mind to vote in favor of a sentence of life imprisonment if called upon to take part in a sentencing proceeding?
>
> Prospective Juror One: Yes.

(*Id.* at 92-93.) The Court then allowed the State's challenge for cause. Petitioner's counsel asked permission to question the juror, but the court denied the request.

The next prospective juror excused for cause stated unequivocally when questioned by the State that she would automatically vote for life imprisonment instead of the death penalty during sentencing, no matter how aggravated the circumstances in the case, because she believed in rehabilitation. (*Id.* at 106-08.) The State challenged her for cause and the court conducted its own questioning of the prospective juror. When asked if she would vote automatically for life imprisonment, she answered, "I can't imagine a case that I wouldn't vote for life imprisonment because I believe in the opportunity for rehabilitation for the involved party." (*Id.* at 108.) The court excused the prospective juror, and Petitioner did not seek to rehabilitate the juror.

The third juror excused for cause by the State was unequivocal in his opinion. (*Id.* at 109-10.) When asked by the State whether he would automatically vote for life imprisonment instead of the death penalty, regardless of the evidence presented, he answered, "Yes, sir, under no circumstance would I vote for death." (*Id.* at 109.) The Court again conducted an independent examination, and the prospective juror re-stated his firm conviction. The prospective juror was excused for cause, and defense counsel did not attempt to rehabilitate him.

The fourth prospective juror excused for cause because of her unwillingness to vote to impose the death penalty under any circumstances vacillated somewhat before she ultimately concluded that she could not impose the death penalty. (Vol. 2 at 487-90.) She was first questioned by the court and then by the State. At first she stated that she didn't think that there were any circumstances under which she would vote for a death sentence. After further questioning by the court, she stated that she thought that she could give fair consideration to the death penalty and follow the court's instructions and the law. The State then questioned the prospective juror to try to reconcile her two seemingly inconsistent statements. She again indicated that she thought that she would automatically vote for life imprisonment over the death penalty in sentencing. She stated that her views on the death penalty would substantially impair her from being able to apply the law as instructed by the court. The State's challenge for cause was allowed, and Petitioner's counsel objected to this ruling although they did not attempt to rehabilitate the prospective juror.

The MAR court found that the record showed these four prospective jurors to be unequivocally opposed to the death penalty. (MAR Order at 21.) The MAR court also found that Petitioner did not raise an objection as to the first three prospective jurors during his initial appeal to the North Carolina Supreme Court and that his objection as to the fourth prospective juror was rejected on its merits by the North Carolina Supreme Court. *See* MAR Order at 21; *Flippen I*, 344 N.C. at 697-98. Thus, the MAR court found that Petitioner's claims regarding the first three prospective jurors were procedurally barred. Despite this finding, the State now concedes that this finding of procedural bar was "probably incorrect" since Petitioner's claim in the initial appeal was likely sufficiently general to raise an issue as to all four jurors excused for cause.

The MAR court's determination of this claim as without merit is not contrary to and does not involve an unreasonable application of clearly established Federal law. The State and the trial judge conducted an in-depth examination of the four witnesses excused for cause. Two of the prospective jurors simply stated outright that under no circumstances could they vote to impose the death penalty in sentencing. The other two prospective jurors excused for cause were not quite so direct, but they nonetheless revealed deep misgivings about imposing the death penalty. The trial judge then directly questioned these jurors until they provided clear answers and stated that they could not impose the death penalty in sentencing.

The Sixth and Fourteenth Amendments guarantee the right to trial by an impartial jury and therefore extend to ensure that jury *voir dire* does not result in the excusal for cause of jurors whose conscientious objections to capital punishment would not prevent them from impartially applying the law to the facts of the case. *See Wainwright v. Witt*, 469 U.S. 412, 416 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 513-14 (1968). *Witherspoon*, instead of serving as a grounds for excluding prospective jurors, serves as a limitation on the state's power to exclude for cause prospective jurors based on their opinion on the death penalty. *See Adams v. Texas*, 448 U.S. 38, 47-48 (1980). "[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 45. However, it is not necessary to prove juror bias with "unmistakable clarity." *Wainwright*, 469 U.S. at 424. A trial judge's finding that a prospective juror is biased is a finding of fact. The judge has to make a determination about a venireman's state of mind and must make determinations of demeanor and credibility that are afforded great deference. *See id.* at 427-28; *Patton v. Yount*, 467 U.S. 1025 (1984).

A trial court's jury selection procedures are not constitutionally mandated but are left to the trial court's discretion. *See Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976). "[A]bsent 'special circumstances' that create a particularly compelling need to inquire into . . . prejudice, the Constitution leaves the conduct of *voir dire* to the sound discretion of trial judges." *Turner v. Murray*, 476 U.S. 28, 38, n.12 (1986). A "generalized but thorough inquiry into the impartiality of the veniremen" is constitutionally sufficient. *Ristaino,* 424 U.S. at 598.

Consistent with the more generalized principles of jury selection, there is no constitutional guarantee that the defense be given the opportunity to rehabilitate prospective jurors who are excused for cause because of their unwillingness to impose a death sentence. In *State v. Cummings,* 326 N.C. 298 (1990), the North Carolina Supreme Court held that:

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

Id. at 307 (*quoting State v. Oliver*, 302 NC 28, 40 (1981)). The option of allowing rehabilitation of jurors has been left under state law to the trial court's sound discretion.

In Petitioner Flippen's case, defense counsel filed prior to trial a Motion to Allow Defense Counsel to Question Jurors Subsequent to Challenge for Cause by the State. (Respondent's Answer, Ex. B at 42-43.) The trial court ruled against this blanket motion and stated that it would "exercise its discretion in determining whether rehabilitation of any potential juror should be allowed." (Transcript of jury selection at 27-28.) During *voir dire*, counsel requested the opportunity to attempt to rehabilitate the first juror excused for cause because of her unwillingness to impose the death penalty, but this effort was denied by the court. By this time in the proceeding, it was readily

apparent that, within its discretion, the trial court chose to conduct its own detailed examination of prospective jurors challenged for cause instead of allowing defense counsel to conduct the examination or a rehabilitation. It was therefore reasonable for defense counsel to conclude that the court would not allow attempts to rehabilitate jurors after the court conducted its own comprehensive questioning.

A close analysis of the record, as detailed above, shows that two of the three prospective jurors excused for cause after the court denied defense counsel's request to rehabilitate the inital juror excused for cause were positively unequivocal about their unwillingness to impose the death penalty under any circumstances. It was entirely reasonable for counsel to conclude that any attempt to rehabilitate these prospective jurors would be futile. The fourth prospective juror excused for cause was questioned first by the trial court and then by the State. She was not able to say with absolute certainty that she could not impose the death penalty under any circumstances, but she stated that she thought she would automatically vote for a life sentence over the death penalty and that her views on the death penalty would substantially impair her from being able to apply the law as instructed by the court. Under *Adams* and *Wainwright*, it is not necessary to prove bias with unmistakable clarity but only to show that the prospective juror's views would substantially impair the performance of duties as a juror in accordance with instructions and the oath. It would clearly have been futile for counsel to request to rehabilitate the juror after she had been so thoroughly questioned by the State and the court. Additionally, defense counsel did object to this juror's excusal for cause, but the court overruled the objection.

As a secondary claim, Petitioner contends that the State used peremptory challenges to remove seven prospective jurors who, during voir dire, expressed hesitancy about the death penalty

even though they said that they would be able to put their personal feelings aside and sentence Petitioner to death if the law required it. (Transcript of jury selection, Vols. 1, 2 at 112, 113, 119-20, 312-14, 315-17, 320-27, 539-40.) Petitioner argues that trial counsel provided ineffective assistance of counsel when they failed to object to this use of peremptory challenges.

While there is no reason to necessarily conclude that these seven prospective jurors were removed by the State through the use of peremptory challenges either mainly or solely on the basis of their views about the death penalty, this Court, for the purpose of argument, will assume this to be the case. As authority for the proposition that the State cannot use peremptory challenges to remove jurors who are personally opposed to the death penalty, Petitioner cites *Batson v. Kentucky*, 476 U.S. 79 (1986), which disallows the systematic removal of jurors through peremptory challenges on the basis of race.

Fourth Circuit law is contrary to the position argued for by Petitioner. *See Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989)(prosecutor may use peremptory challenges to purge a jury of veniremen not excludable for cause under *Witherspoon v. Illinois*). *Batson* has not been extended by the United States Supreme Court past its specific holding that prevents the prosecution from using peremptories to systematically remove prospective jurors on the basis of race. *See Brown*, 891 F.2d at 497-98. Courts are not authorized to scrutinize every use of peremptory challenges. *See id.* The State is entitled to use peremptories to remove prospective jurors who may not be excluded under *Witherspoon*. *See id.* Accordingly, defense counsel was not ineffective in failing to object to the State's permissible use of peremptory challenges.

CLAIM I.A.5

Petitioner contends that he received ineffective assistance from defense counsel when counsel failed to object to a portion of the prosecutor's closing argument to the jury. Petitioner contends that the State's closing argument was improper because the prosecutor described in detail how the victim would have suffered when she was killed and her reaction to the Petitioner when he fatally assaulted her. (Trial Tr. at 1127-29.) Petitioner contends that there is no evidence as to how the victim reacted to the fatal incident since Petitioner was the only person in the trailer with her when she was injured and Petitioner, during his trial testimony, never even admitted that he attacked the victim. Petitioner objects to arguments the prosecutor made about Brittany's physical reaction to the attack, about the pain she would have felt that would have caused her to stop moving, and how she would have felt nausea and dizziness. (*Id.* at 1127-28.) Petitioner also contends that it was improper for the prosecutor to suggest that Petitioner attacked the victim because she was crying and wanted her Mommy. (*Id.* at 1129, 1188.) The MAR court found that these arguments were proper and were based on the testimony of the victims mother, Tina Flippen, and the State's pathologist, Dr. Donald Jason. (MAR Order at 17-20.) Moreover, the MAR court found the claims to be procedurally barred for Petitioner's failure to raise them on direct appeal.

Review of the record shows that the State's closing arguments were fairly based on testimony given at trial. Petitioner himself testified that the victim was crying on the morning the fatal incident occurred when her mother left the home and that she would often cry when her mother left. (Trial Tr. at 963-64.) Tina Flippen, the victim's mother, testified that the victim did not want her mother to leave the home that morning; that the victim told her mother, "I want my Mommy. I want my

Mommy"; and that Petitioner said, "You're not going to act like that all day, are you?" (*Id.* at 724-25.)

Dr. Jason described in detail the numerous fresh bruises which were caused by blunt force trauma and the scratches that the victim suffered. (*Id.* at 884-94.) Dr. Jason described how the victim died from internal bleeding that was caused by the tearing of the liver and pancreas. (*Id.* at 894.) He described how the organs were torn from a blow or blows to the belly that caused the organs to push against the spine. (*Id.* at 895.) He described how this would take a great deal of force consistent with a powerful punch. (*Id.* at 895.) He described how such a blow would have stunned the child and caused her to feel pain. (*Id.* at 896.) He stated that she would have eventually become unconscious before she died but that at first she would have been conscious and would have felt an excruciating, severe, sharp pain in the upper abdomen which would have been made worse by breathing. (*Id.* at 897.) She would have become dizzy and nauseated. (*Id.* at 906.) Dr. Jason explained how the bruises to the victim would have been painful. (*Id.* at 899-907.) He stated that the scratches were consistent with something grabbing the victim. (*Id.* at 901-02.) Dr. Jason concluded that the bruises and organ injuries were caused by blows that were consistent with blows from a fist and the scrapes were consistent with scrapes caused by fingernails. (*Id.* at 907.)

Under North Carolina law, the prosecution is granted wide latitude in the scope of argument, and "argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Zuniga*, 320 N.C. 233, 253 (1987). Generally, argument is proper when it is based on the evidence or an inference reasonably drawn from the facts in evidence. *See U.S. v. Talley*, 135 F.3d 291, 298 (4th Cir. 1998).

This Court's review shows that the closing arguments made by the prosecutor were either directly based on testimony at trial or were reasonable inferences drawn from the evidence. Defense

counsel was not ineffective for failing to object to the proper closing arguments made by the State. In any event, Petitioner's habeas claim to this Court is procedurally barred, and Petitioner has shown nothing to allow him to avoid the bar.

Ineffective Assistance of Counsel Claims at Second Sentencing Hearing

CLAIM I.B.1

Petitioner contends that he received ineffective assistance of counsel at his resentencing hearing when defense counsel failed to obtain a medical expert to review and evaluate the State's autopsy report, to prepare for cross-examination of the State's medical witnesses, to present evidence for Petitioner, and to refute the "especially heinous, atrocious or cruel" aggravating factor. As in claim I.A.2 above, Petitioner makes no showing that a medical expert would have disagreed with the State's expert but nonetheless maintains that such an expert could still have helped Petitioner present evidence to refute the State's theory that the murder was especially heinous, atrocious or cruel.

For the resentencing hearing, the trial court ordered that funds be allocated for the defense to hire a pathologist. (Respondent's Answer, Ex. G at 3.) Defense counsel advised the trial court immediately prior to the opening of the resentencing hearing that they had attempted to retain several pathologists, but all had stated they had no interest in being involved in the case. They located a Dr. Garrett who agreed to review the records, but Dr. Garrett subsequently decided not to appear at trial. The prosecution extended the courtesy of providing defense counsel with the names of two pathologists who might help Petitioner. Thereafter, Petitioner retained Dr. Kim Collins to review the records and sit in court in a consultive capacity. (Respondent's Answer, Ex. F1, Tr. of Sentencing Hr'g, Vol. One at 14-19.) Petitioner and the State now disagree as to whether Dr. Collins

actually attended the resentencing. On review of the transcript at resentencing, it is clear that Dr. Collins did not testify. Petitioner contends that there is no evidence that Dr. Collins even attended the hearing in a consultive capacity, citing two statements made by defense counsel early in the resentencing indicating that Dr. Collins had not appeared as of that time. In these statements defense counsel Crumpler explained to the court that he thought Dr. Collins would appear and that she said she would appear. (*Id.* at 19, 108.)

The MAR court found that the Petitioner had not produced any evidence to show that a defense pathologist would have disagreed in any way with the State's pathologist. (MAR Order at 75.) The MAR court made findings that defense counsel contacted numerous pathologists in search of an expert, that defense counsel found Dr. Garrett and convinced him to review the record, that Dr. Garrett declined to serve as a witness after reviewing the record, that the District Attorney supplied defense counsel with the names of two pathologists, that one of the pathologists referred by the prosecution, Dr. Collins, agreed to review the records and sit in court in a consultive capacity, and that Dr. Collins did in fact attend the relevant parts of the resentencing hearing. (MAR Order at 75.) In this habeas action, Petitioner provides no evidence that the MAR court's findings of fact on this matter are unreasonable. The only argument Petitioner provides is that Dr. Collins' presence is not affirmatively noted in the transcript. However, since she only served in a consultive capacity, there would be no reason for her presence to be noted.

In any event, Petitioner's failure to present any evidence at this time that a pathologist could have been found who would have disagreed in a significant way with the State's medical evidence is fatal to Petitioner's habeas claim. Petitioner has made absolutely no showing of potential prejudice as a result of counsel's alleged deficiency with regard to making use of a pathological

expert. Counsel had an obligation to conduct reasonable investigations or to make a reasonable decision that further investigation is unnecessary, but Petitioner has shown nothing to suggest that counsel failed in this regard. *See Strickland*, 466 U.S. at 691. The MAR court's determination that defense counsel's considerable efforts to obtain a medical expert were sufficient is not unreasonable under established United States Supreme Court jurisprudence, and, in any event, Petitioner has shown no prejudice.

CLAIM I.B.2

Petitioner contends that he received ineffective assistance of counsel at his resentencing hearing when counsel failed to attempt to rehabilitate jurors who were excused for cause after they, during *voir dire*, expressed their opposition to capital punishment and stated that they could not sentence Petitioner to death. Petitioner also contends that he received ineffective assistance from counsel when counsel failed to object to the State's "death qualifying" of the jury through the use of peremptory challenges to remove jurors who expressed concerns about the death penalty but stated they were able to put their personal concerns aside and follow the law.

Seven prospective jurors and one prospective alternate juror were removed for cause based on their inability to apply the death penalty under any circumstances. (Tr. of Sentencing Hr'g at 174, 176, 178, 180, 181, 207, 348, 481.) The first prospective juror excused for cause was questioned by the court. She was asked if she knew of any reason why she could not be a juror in the sentencing hearing. She stated that she could not favor the death penalty and could not sentence Petitioner to death. The court then asked more specifically if given the choice between sentencing Petitioner to life in prison or death, the juror would choose to impose a life sentence regardless of the facts and law. The prospective juror answered that she would have to impose a life sentence. The court

excused the juror, and defense counsel did not object or attempt to rehabilitate the prospective juror. (*Id.* at 173-74.)

The second prospective juror excused for cause answered "[n]o" when asked if she could fairly and impartially consider both potential punishments. She stated that it would be very hard for her to impose the death penalty. When further questioned by the court she stated that she was not sure she could set her preference aside and go by the evidence and law. The court reformulated its question several times in order to obtain a more specific answer. Once the juror stated that she could not assure the court that she could set her preference aside, once she stated that she would impose a life sentence ninety-eight percent of the time and it would have to be an extreme case for her to vote for the death penalty, once again she stated that she was not sure she would be able to set aside her preference and follow the court's instructions, once she stated that she would probably always vote for a sentence of life imprisonment, and finally she stated that she would vote to reject the death penalty. The court excused the prospective juror and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 174-77.)

The third prospective juror excused for her views on the death penalty was unequivocal in her unwillingness to impose a death sentence regardless of the facts and law. When asked by the court if she would always vote for life imprisonment and reject the death penalty regardless of the facts and the law, the prospective juror replied, "[y]es." This prospective juror was excused for cause by the court and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 177-78.)

The fourth prospective juror excused for cause was unequivocal. The Court asked this prospective juror if he could fairly and impartially consider both life imprisonment and the death

penalty, and the juror responded that "[n]o, sir, I couldn't vote for the death penalty." (*Id.* at 179.) The Court reformulated the question several times and received the same unequivocal response. This prospective juror was excused for cause by the court and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 179-80.)

The fifth prospective juror excused for cause because of her unwillingness to apply the death penalty was similarly unequivocal when questioned by the court. The court asked her five times and in different ways whether she would be willing to consider the death penalty under any circumstances, and she stated each time that she would always vote for life imprisonment over the death penalty. This prospective juror was excused for cause by the court and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 180-81.)

The sixth prospective juror excused for cause stated that "according to religious and moral -- and convictions of morals (sic), I don't believe in the death penalty or life imprisonment because this young man is young. I think he has done a crime, but I feel like he should be given, if anything, life imprisonment and then parole." (*Id.* at 207.) When the court further asked if she would always vote for life imprisonment over a death sentence, she answered "[y]es." This prospective juror was excused for cause by the court and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 207.)

The seventh prospective juror removed for cause because of her unwillingness to apply the death penalty was initially questioned by the State. She stated that she did not believe in the death penalty. The prosecutor asked her, "if given the choice between life and death, you would always select life imprisonment?" (Ex. F2, Tr. of Sentencing Hr'g, Vol. Two at 346.) She answered "[y]es." (*Id.* at 346.) When asked if this was regardless of the facts of the case, she answered affirmatively.

The State challenged this prospective juror for cause. The court then independently asked if the prospective juror would always choose life imprisonment regardless of the facts and the law as instructed by the court. The prospective juror answered that she would always vote for life imprisonment. The court excused this prospective juror for cause and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 347-48.)

A prospective alternate juror was excused for cause. The court asked this prospective juror if he could put his opposition to the death penalty aside and vote for the imposition of the death penalty if the evidence and law warranted it. He stated that he did not think that he could. The prospective juror further stated that he would lean strongly in favor of a life sentence. Upon being questioned three more times, the prospective alternate each time stated that he did not think he could vote to impose a death sentence under any circumstances. This prospective juror was excused for cause by the court and defense counsel did not object or attempt to rehabilitate the juror. (*Id.* at 480-83.)

Defense counsel did make a motion at the start of the second sentencing hearing to be allowed to question jurors subsequent to challenge for cause by the State. Counsel requested that the court not rule on the motion at the time but rather rule on it individually after each prospective juror challenged for cause. The court agreed to defer ruling on the motion. (Ex. F1, Tr. of Sentencing Hr'g, Vol. One at 3.)

For all the reasons stated by this Court in Claim I.A.4 above, defense counsel was not ineffective for failing to object to or attempt to rehabilitate the prospective jurors excused for cause because of their unwillingness to apply the death penalty. In each instance, the court at resentencing thoroughly questioned the prospective juror. Each juror was unwilling to fairly consider the death

penalty as a possible sentence. It would have been futile for Petitioner to request permission to rehabilitate these prospective jurors, and there is absolutely no basis for a finding that such as attempted rehabilitation would have had a reasonable likelihood of success.

The Court will not here address Petitioner's claim that the State improperly used peremptory challenges to remove jurors opposed to the death penalty since this claim is meritless for all the reasons set forth under Claim I.A.4 above.

CLAIM I.B.3

As with regard to the guilt/innocence phase of trial, Petitioner contends that his counsel improperly conceded his guilt in the closing argument of his resentencing hearing without obtaining his consent. The record shows that defense attorney Freedman began his closing argument asking the jury to focus on the issue at resentencing by concentrating on aggravating and mitigating factors instead of allowing the State to play on emotions. (Ex. F4, Tr. of Sentencing Hr'g, Vol. Four at 886-87.) He stated that in the sentencing hearing there is no question as to whether Petitioner is a first-degree murderer. (*Id.* at 887.) Mr. Freedman stated that "you know sitting before you is Sammy Flippen who is a convicted first-degree murderer, and you know that he did that to Brittany Nicole Hutton." (*Id.* at 886.) He then stated:

> But that's not what this case is about. This child died from internal injuries, from a blow to the stomach; there's no question about that. That man delivered that blow; there's no question about that. That constitutes first degree murder, there's no question about that, by premeditation, deliberation and malice. That's not the issue, regardless of how much the State would like to make that the issue to [raise] your emotions to a level where you just want to strike out. The issue in this case, and the only issue in the case, and the only issue you are to decide, is what the appropriate punishment for Sammy Flippen should be.

(*Id.* at 887-88.) Although Petitioner concedes that defense counsel was in a difficult position at the resentencing hearing because the Petitioner's guilt had already been established as a matter of law,

Petitioner contends that counsel's statements were prejudicial and that even if there were a legitimate tactical reason for making these statements, defense counsel should have obtained Petitioner's expressed, documented consent to make them.

The MAR court found that Petitioner had already been found guilty of first-degree murder at his trial and that the judge had instructed the venire of this fact at resentencing. (MAR Order at 77.) The MAR court concluded that the statements made by defense counsel in closing at resentencing were an attempt to show that Petitioner's life should be spared and were the result of strategic decisions well within the range of reasonable professional assistance. (*Id.* at 78.)

The only issue at resentencing was whether Petitioner should be given a death sentence or a life sentence. This required the jury to make determinations about aggravating and mitigating factors and to weigh these factors against each other. The jury was instructed that the issue of underlying guilt was not before them and that Petitioner had already been found guilty of first-degree murder. Thus, defense counsel did not make a "concession" as to any issue that was before the jury. Defense counsel was only explaining a matter of law to the jury - that Petitioner was a convicted first-degree murderer and that his guilt was not an issue in front of them. Mr. Freedman described the most favorable version of Petitioner's guilt, saying that the victim's death was the result of "a blow," just a single blow, delivered by Petitioner.

Counsel were entitled to make certain strategic decisions and concessions in order to attempt to persuade the jury to sentence Petitioner to life imprisonment. In *Kitchens v. Johnson*, 190 F.3d 698, 704 (5th Cir. 1999), during a capital sentencing hearing, counsel admitted that his client was guilty of a brutal murder but argued that the murder was not a capital murder. This argument was considered by the court to be a strategic decision made to bolster credibility with the jury, and as

such could not be "second-guessed." *Id.* The court also noted that even if counsel's arguments were ill-considered, there was no prejudice. *See id.* "[C]ounsel's concession of a client's guilt does not automatically constitute deficient performance." *Young v. Catoe*, 205 F.3d 750, 759 (4th Cir.), *cert. denied*, 531 U.S. 868 (2000). There is a distinction between a tactical retreat and a complete surrender. *See Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990). While complete concession of guilt may constitute ineffective assistance of counsel, certain tactical retreats may be "reasonable and necessary" when there is overwhelming evidence of guilt. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

Defense counsel's statements about Petitioner's guilt to first-degree murder were a recognition of an established legal fact, a fact not in issue in the proceeding before the resentencing jury. The MAR court was not unreasonable in its conclusions that these statements were the result of a tactical decision intended to win the support of the jury, and that there was no prejudice to Petitioner in recognizing facts already determined in the guilt/innocence phase of trial.

CLAIM I.B.4

Petitioner contends that defense counsel provided ineffective assistance of counsel when they failed to object to the State's closing argument during resentencing. In the portion of the argument Petitioner objects to, the State was drawing conclusions from Petitioner's violent nature, including instances when he had assaulted his wife.

> And the other occasion, where they were picking in the bedroom. She popped him on the head and he went off, jumped on top of her, put his knee in her shoulder to the point next day it caused a bruise, would not let her up, would not let her out of that trailer, pulled the phone out of the wall, or phone cord out of the wall, and tried to get her daughter until she stepped in and stopped it. Jumping on her, Members of the Jury, causing that bruise is an assault on female. But more importantly, what makes it significant, is that he reacted violently again. The only way you can be sure

this will never happen again is to vote for death. Because you know how he reacts. You've seen it. That evidence is uncontradicted. That makes it significant.

(Tr. of Sentencing Hr'g, Vol. Four at 871-72.)

As noted above under Claim I.A.5, argument is proper when it is a reasonable inference drawn from facts in evidence. The State had presented evidence that Petitioner had assaulted his wife in order to show that the Petitioner should not be eligible for the N.C. Gen. Stat. § 15A-2000(f)(1) mitigator for having no significant history of prior criminal activity.[1] Arguments of specific deterrence have been upheld in North Carolina capital cases. *See State v. Zuniga*, 320 N.C. 233, 269 (1987). The State's closing argument was proper, so defense counsel did not provide ineffective assistance by failing to object to it. Moreover, the presentation of this argument to the jury, even if it be error, was not prejudicial. There is simply no reasonable probability of a different outcome at resentencing but for this argument.

CLAIM I.B.5

Petitioner contends that defense counsel provided ineffective assistance by failing to adequately prepare for Petitioner's resentencing hearing. Specifically, Petitioner objects to the strategy of defense counsel in calling Dr. Earl Schwartz. Dr. Schwartz had not been a witness at the guilt/innocence phase of Petitioner's trial. He was the emergency room doctor who treated the victim when she was brought to the hospital. Dr. Schwartz provided "mixed" testimony. He testified that some of the bruises on the victim might have been older and therefore not likely resultant from the fatal incident. (Tr. of Sentencing Hr'g, Vol. Three at 703.) This might have tended to persuade the

[1]It should be noted that the jury found the N.C. Gen. Stat. § 15A-2000(f)(1) mitigator in spite of the State's attempts to establish a criminal history, and this may show that the jury did not find this part of the State's argument very persuasive. It would thus be difficult to show prejudice even if the argument were improper.

jury that the Petitioner had not inflicted all of the injuries found on the victim, and therefore the "especially heinous, atrocious or cruel" aggravating factor should not apply. However, Dr Schwartz also testified that the injuries did not seem to be consistent with a fall from a chair. (*Id.* at 698.) Petitioner now contends that Dr. Schwartz did not help his case, and that it only served to strengthen the State's case. Petitioner argues that defense counsel were ineffective because they either did not know what testimony Dr. Schwartz would give when they called him (and thus did not adequately prepare for the second sentencing hearing) or they failed to understand the negative impact of Dr. Schwartz' testimony.

The MAR court found that defense counsel called Dr. Schwartz to establish that Petitioner did not regularly batter his stepdaughter and that he did not inflict all of the injuries indicated in the autopsy. (MAR Order at 80.) The MAR court's additional finding that calling Dr. Schwartz was a tactical decision by counsel is not unreasonable under the record in this case. As analyzed under Claim I.A.1 above, strategic decisions made after a thorough investigation and analysis of the facts are virtually unchallengeable on habeas review. Dr. Schwartz' testimony was not particularly harmful to Petitioner and it could have proved helpful. At worst it was repetitive of the State's case. Dr. Schwartz' testimony that the victim's injuries were inconsistent with a fall was not significantly harmful because after being found guilty of first-degree murder, Petitioner was no longer in a position to contend to the sentencing jury that the victim was injured in a fall from a chair. Moreover, the testimony may have tended to show that Petitioner did not inflict all the bruises shown by the State's evidence. This could have been a factor tending to disprove the "especially heinous, atrocious or cruel" aggravating factor. The MAR court's determination that counsel's strategy was a reasonable tactical decision is not unreasonable under governing Supreme Court law.

Ineffective Assistance of Appellate Counsel

CLAIM I.C

Petitioner contends that his appellate counsel in *Flippen I* and *Flippen II* provided ineffective assistance of counsel on direct appeal by failing to raise ineffective assistance of counsel claims related to the trial and sentencing. Petitioner argues that the reason for this failure was that Petitioner was represented on direct appeal by the same two attorneys who represented him at trial, Attorneys Crumpler and Freedman. Petitioner contends that his counsel had a conflict of interest that prevented them from arguing that they had provided ineffective assistance of counsel at trial and during sentencing. The record shows that Petitioner also had additional appellate counsel, Mr. Dudley Witt, who worked with Attorneys Crumpler and Freedman on Petitioner's direct appeal. The MAR court found that there was neither ineffective assistance of appellate counsel nor prejudice to Petitioner from counsel's performance. (MAR Order at 81-83.)

The Sixth Amendment right to effective assistance of counsel extends to require such assistance on direct appeal of a criminal conviction. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). However, in order for this claim to succeed, the underlying claims of ineffectiveness must have merit. Otherwise, Petitioner could not have been prejudiced by appellate counsel's failure to raise the claims in question. In Claims 1.A and 1.B above, this Court has found no merit in Petitioner's claims of ineffective assistance of counsel during either the guilt/innocence phase of trial or the resentencing hearing. Thus, there can be no prejudice from appellate counsel's allegedly ineffective performance.

Further, the Court notes that appellate counsel is allowed wide latitude in determining which claims are most likely to succeed on appeal and are therefore worth bringing. *See Jones v. Barnes,*

463 U.S. 745, 751-54 (1983); *Fisher v. Lee*, 215 F.3d 438, 457 (4th Cir. 2000), *cert. denied*, 531 U.S. 1095 (2001). Counsel is not required to assert all non-frivolous issues on appeal. *See Jones,* 463 U.S. at 751-52; *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989). Instead, one of the hallmarks of effective advocacy is "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones*, 463 U.S. at 751-52. This prevents the dilution of the strongest arguments by those that are merely non-frivolous. As this Court has determined that Petitioner's claims of ineffective assistance of counsel at trial and resentencing are non-meritorious, there is no basis for finding that the MAR court's denial of this claim I.C. is unreasonable under clearly established federal law.

CLAIM II

Petitioner contends that his right to be present at his trial was violated when unrecorded bench conferences were held outside his presence at the guilt/innocence phase of his trial (Trial Tr. at 50, 241, 274, 374, 421, 517, 557, 708, 738, 761, 1038, 1052, 1054, 1091, 1127, 1231, 1237, 1249), at his resentencing hearing (Tr. of Sentencing Hr'g at 95, 206, 231-33), and when a pretrial conference was conducted without his presence. Additionally, he contends that his right to be present was violated when, at one point during jury selection at resentencing, Petitioner left the courtroom with one of his counsel. (*Id.* at 182.) The MAR court found these claims, insofar as they are based on the guilt/innocence phase of Petitioner's trial, are procedurally barred because they were not raised on direct appeal. (MAR Order at 11.) Additionally, the MAR court found that Petitioner was not prejudiced by any of the unrecorded conferences. (*Id.* at 11-12, 37, 48.)

A defendant's constitutional right of presence during trial is derived from the Confrontation Clause of the Sixth Amendment and also from the Due Process Clause of the Fourteenth

Amendment in instances where the defendant is not actually confronting witnesses or evidence against him. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985). A defendant has a due process right to be present at a proceeding "'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Id.* at 526 (*quoting Snyder v. Mass.*, 291 U.S. 97, 105-08 (1934)).

In the case at bar, in each instance Petitioner contends he was not present, Petitioner was represented by counsel. Petitioner fails to allege how he was prejudiced by his absence at bench conferences and certain pre-trial conferences. Although he was always represented by counsel, he does not allege any specific content of the bench conferences that would make his presence compulsory. The MAR court found that he had not shown that he was absent at any point during jury selection, and Petitioner has shown nothing to this Court to rebut that finding. (MAR Order at 64.) Petitioner specifically contends that he was not present at a pre-trial conference where the State announced it would seek the death penalty and was thus prejudiced because he did not have adequate notice that he would be tried capitally. However, this Court has already rejected Petitioner's Claim I.A.3 that counsel provided ineffective assistance by failing to adequately inform Petitioner that he would be tried capitally. For all of these reasons, there is no basis to determine that the MAR court unreasonably applied federal law in deciding that Petitioner was not deprived of his right to be present at all critical stages of his trial.

CLAIM III

The capital sentencing procedure under North Carolina law allows a jury to find eight specific statutory mitigating factors or "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C. Gen. Stat. § 15A-2000(f). The unspecified, non-statutory mitigating factors do not necessarily carry mitigating weight; the jury "must find the circumstance to exist and that the circumstance has mitigating value." *State v. Lee*, 335 N.C. 244,

292 (1994). Petitioner contends that this two step procedure where the jury must first determine whether a non-statutory mitigating factor exists and then determine whether it has mitigating value violates *Penry v. Lynaugh*, 492 U.S. 302 (1989) by preventing the jury from giving effect to all constitutionally relevant mitigating evidence. Petitioner contends that once the jury finds a non-statutory mitigating factor to exist, the jury should go straight to the next step of the North Carolina procedure and weigh aggravating factors against mitigating factors to determine whether mitigating factors outweigh aggravating factors.

Penry establishes the principle that it is not adequate simply to allow the defendant to present mitigating evidence at sentencing, but the sentencer must be allowed to consider and give effect to this mitigating evidence. *See id.* at 319. This permits the sentence to reflect "a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (*quoting California v. Brown*, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring)(emphasis in original)). In *Penry*, the defense offered mitigating evidence concerning the defendant's mental retardation and abuse as a child, but the jury was allowed to answer only three questions in sentencing: did the defendant act deliberately, is there a probability of future dangerousness, and did the defendant act unreasonably in response to provocation. *See Penry*, 492 U.S. at 320. The jury was never instructed that it could consider the defendant's evidence regarding retardation and abuse or that it could give mitigating effect to the evidence. *See id.*

Petitioner contends that the North Carolina two-step process for non-statutory mitigating factors is repetitive and confusing because it forces the jury to twice considering the factors' mitigating value. Petitioner contends that since some of the ten non-statutory mitigating factors submitted by Petitioner were virtually unchallenged by the State, it is unreasonable to believe that at least one member of the jury did not find at least one of these factors to have mitigating value. Petitioner specifically mentions the factors that Petitioner was a churchgoer, that he completed high school, and that he maintained steady employment. Petitioner contends that it is unacceptable for it to be impossible to know whether the jury rejected a mitigating factor, say that Petitioner was a

churchgoer, because (1) they thought that this factor would never have mitigating value without actually determining whether Petitioner was a churchgoer, (2) they determined that there was insufficient evidence Petitioner was a churchgoer, or (3) they determined Petitioner was a churchgoer but decided that this did not have mitigating value.

On review, the Court finds that the North Carolina procedure for jury consideration of non-statutory mitigating factors is not inconsistent with *Penry's* requirement that the jury be allowed to consider and give effect to all relevant mitigating evidence. The procedure specifically requires the jury to consider whether a factor exists and then determine whether that factor has mitigating value. The legislature has determined that the eight statutory factors have mitigating value, thus taking the second step of the process away from the jury as to these factors. The jury must only consider whether a defendant establishes these factors by a preponderance of the evidence. For factors other than these eight statutory mitigating factors, the jury is left to determine whether the factors have mitigating value. There are no limits on the other factors that a defendant can argue have mitigating value, and the jury can find factors that were not even argued. However, the jury does not have to give these factors mitigating value just because they find them to exist. For example, in this case, there was significant evidence presented that Petitioner graduated from high school, and this evidence was not challenged. However, the jury did not have to find that graduating from high school mitigates murder. This rule of law is fully consistent with *Penry's* demand that the jury be allowed to consider and give effect to all mitigating evidence. The jury, and each juror, may simply find that particular evidence has no mitigating value.

CLAIM IV

Petitioner contends that the proportionality review conducted by the North Carolina Supreme Court in *Flippen II* violated his due process rights by creating a new statutory aggravating factor for

the murder of a child by affirming the "especially heinous, atrocious, or cruel"[2] aggravating factor in virtually all cases where a child is the victim. Additionally, Petitioner contends that his due process rights were violated when his sentence was affirmed on proportionality review when his case was not similar to the other cases in the most accurate proportionality pool except in the fact that all the cases involved the killing of a child.

As the Supreme Court of North Carolina stated in *Flippen II*, proportionality review serves to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury" 349 N.C. at 277 (*quoting State v. Lee*, 335 N.C. 244, 294 (1994)) and to guard "against the capricious or random imposition of the death penalty." *Id.* (*quoting State v. Barfield*, 298 N.C. 306, 354 (1979)). The Supreme Court of North Carolina found the Petitioner's case much more similar to cases where a death sentence was found proportionate than to the seven prior cases where a death sentence was found disproportionate. *See Flippen II*, 349 N.C. at 277-79.

Proportionality review is not mandated under the federal Constitution. *See Pulley v. Harris*, 465 U.S. 37 (1984); *Peterson v. Murray*, 904 F.2d 882, 887 (4th Cir. 1990). Accordingly, proportionality review is solely a matter of state law. Thus, even if the North Carolina Supreme Court in *Flippen II* made a mistake of North Carolina law, the matter could not be reviewed on a federal habeas corpus petition. *See id. Pulley* recognizes that "[a]ny capital sentencing scheme may occasionally produce aberrational outcomes." *Pulley*, 465 U.S. at 54. The United States Supreme Court has "occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime." *Id.* at 43. This case, however, is not a case so aberrational as to mandate federal proportionality review. Petitioner was convicted of murdering his two-year-old stepdaughter with his bare fists, producing great pain and

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[2]N.C. Gen. Stat. § 15A-2000(e)(9).

anguish in the child before her death. The jury found no mitigating circumstance other than that Petitioner had no significant prior criminal history. Petitioner's argument that it is unconstitutional to consider the age of the victim in determining whether to submit the N.C. Gen. Stat. § 15A-2000(e)(9) aggravating factor would be a new rule of federal law, and as such cannot be created on habeas review. *See Teague v. Lane*, 489 U.S. 288 (1989).

CLAIM V

Petitioner contends that the Double Jeopardy Clause was violated when the court at resentencing did not give a mandatory peremptory instruction on the statutory mitigating factor that Petitioner had no significant history of prior criminal activity. In Petitioner's first sentencing hearing, the State stipulated to the existence of this statutory mitigator, but the court failed to give the jury a peremptory instruction that the factor must be given mitigating effect. The jury failed to find the existence of the mitigating factor. Petitioner was granted a second sentencing hearing when the North Carolina Supreme Court found error in the judge's failure to give a peremptory instruction. *See Flippen*, 344 N.C. at 699-702.

At the second sentencing hearing, the State did not stipulate to this mitigating factor and instead presented some evidence of prior criminal behavior by Petitioner. Since there was no stipulation, and there was some evidence of criminal activity, the court did not give a peremptory instruction, and allowed the jury to determine the existence or non-existence of the factor. Nonetheless, the jury did find this, and only this, mitigating factor - that Petitioner had no significant history of prior criminal activity.

On review, the Court finds no double jeopardy violation under these circumstances. The Double Jeopardy Clause proscribes a second trial after an acquittal. *See Poland v. Arizona*, 476 U.S. 147, 156 (1986). However, aggravating and mitigating factors are not separate penalties or offenses

but are only guides for determining a sentence. *See id.* At a second sentencing hearing after an initial imposition of a death sentence, a "clean slate" is created for contending aggravating and mitigating factors. *Id.* at 157. The State was not required to stipulate to a mitigating factor it had stipulated to in the first sentencing hearing, and it was not precluded from presenting evidence as to the factor. Petitioner was simply not "acquitted" of anything at the first sentencing.

CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED** that the habeas corpus petition of Samuel Russell Flippen be denied and dismissed. The undersigned has not called for oral argument, finding that the written record, the arguments of counsel, and the legal precedents applicable to this case are clear, and oral argument would not be helpful to the court.

P. Trevor Sharp, U.S. Magistrate Judge

March 9, 2004